INDAH WATER KONSORTIUM SDN BHD

v.

GOVINDARAJAN ALAGAR

HIGH COURT MALAYA, IPOH
AHMAD NASFY YASIN JC
[CIVIL APPEAL NO: 12B-8-02-2013]
28 JANUARY 2014

LABOUR LAW: *Employment - Compensation - Claim for - Motor vehicle accident - Whether employment injury - Change of functions from operator to driver - Whether within scope of employment - Whether employee insured under Employees' Social Security Act 1969 - Whether claim barred by s. 31 - Whether parties equally liable*

TORT: *Damages - Road accident - Claim for - Motor vehicle accident - Whether employment injury - Whether employee insured under Employees' Social Security Act 1969 - Whether claim barred by s. 31 - Whether parties equally liable - Special damages - Whether proved - Fracture of right femur and laceration wound - Loss of future earnings - Whether awarded - Civil Law Act 1956, s. 28A*

DAMAGES: *Action for - Personal injuries - Workmen's compensation, whether bar to action - Motor vehicle accident - Whether employment injury - Whether employee insured under Employees' Social Security Act 1969 - Whether claim barred by s. 31 - Whether parties equally liable - Special damages - Whether proved - Fracture of right femur and laceration wound - Loss of future earnings - Whether awarded - Civil Law Act 1956, s. 28A*

WORDS & PHRASES: *Employment injury - Meaning of - Employees' Social Security Act 1969, s. 31 - Motor vehicle accident - Injuries sustained - Whether fell within definition of employment injury - Whether proviso to s. 31 applicable*

The appellant ('defendant') was the employer of the respondent ('plaintiff'). The plaintiff commenced employment on 25 August 2003 as an operator performing desludging services. However, upon the defendant's instruction, the plaintiff drove the defendant's lorry on a daily basis after he was transferred from his former station in Manjung to Teluk Intan. On 26 October 2005, the plaintiff drove the defendant's lorry and met with an accident. As a result, the plaintiff fractured his right femur and suffered from

laceration wounds. Prior to the accident, the plaintiff experienced some difficulties with the lorry as its brakes were faulty. The lorry was taken for repairs but the plaintiff was advised to drive the lorry for a week and to see if any problem still persisted. Although the plaintiff informed his supervisor about the safety of the lorry, the latter instructed him to drive the lorry anyway as there was a lot of work to be done. Alleging that the defendant was to be blamed for the accident, the plaintiff filed a claim for negligence against the defendant in the Sessions Court. The defendant, however, raised a preliminary issue that the plaintiff's action was barred since the injuries sustained was an employment injury and as an insured person under SOCSO, was covered by the Employees' Social Security Act 1969 ('the Act'). Arguing that the injury sustained by him was outside the scope of his employment, the plaintiff submitted that the proviso to s. 31 of the Act was wide enough to cover not only a third party but also the plaintiff, an insured person. Therefore, the plaintiff concluded that his claim for the injuries sustained arose outside the scope of his employment and any SOCSO claim would only be dealt with under his employment contract as an operator. Allowing the plaintiff's claim, the learned Sessions Court Judge ('SCJ') found that the proviso to s. 31 of the Act was wide enough to cover the plaintiff as an insured person and the issues raised could only be determined through a full trial. Hence, the preliminary issue was dismissed. Dissatisfied, the defendant appealed against the whole decision and the plaintiff cross appealed against the issue pertaining to the apportionment of liability. The issues that arose for determination were (i) whether the plaintiff's claim was barred pursuant to s. 31 of the Act; and (ii) whether the defendant was liable to the plaintiff and if so, the extent of damages claimable by the plaintiff.

Held (dismissing appeals):

(1) The SCJ's decision in dismissing the preliminary objection by the defendant was free from error. At the time of accident, the plaintiff was not a driver but an operator. Hence, his claim was for an injury which was outside the scope of his employment. The injuries suffered by the plaintiff were as a result of complying with the directions given by the defendant and was not within the scope of his contract of employment. (paras 14 & 15)

(2) The proviso to s. 31 of the Act provides that the prohibition against a claim is not applicable in cases of motor vehicle accident where the employer or his servant is required to be insured against third party risks. The proviso is wide enough not only to allow claim from a third party but also between the employee and the insured. On the facts, the claim fell within the exception stated in the proviso whereby the claim arose from a motor vehicle accident. The plaintiff's claim for negligence fell within the purview of s. 28A of the Civil Law Act 1956. Hence, the injury suffered by him was not within the definition of "employment injury" under the SOCSO Act. (paras 17 - 19)

(3) It was probable that the defendant knew about the defective brakes and the necessity to change the brake drums but instead, instructed the plaintiff to drive the lorry. The plaintiff was partly to be blamed as he knew the risk of driving the lorry with the defective brakes. Being an operator and not a driver, the plaintiff could refuse to follow the order of his superior to drive. Thus, the plaintiff and the defendant were equally liable. (paras 25 & 26)

(4) The defendant was not caught by surprise as the plaintiff's medical report which clearly alludes to the injury that he had sustained as well as other damages were adduced during trial *vide* the bundles of documents. In any event, the defendant was seized with an opportunity to request for particulars. As such, the contention that the general damages were not pleaded was unsustainable. The global sum of RM45,000 awarded for segmental fracture of the femur with 1.5cm shortening besides scars and laceration was fair and reasonable. (paras 27, 30 & 32)

(5) Special damages have to be specifically pleaded and strictly proved. The plaintiff had failed to produce the application form that he submitted for driver's allowance. Thus, the claim for this item was not allowed. The plaintiff was, however, entitled to the transfer allowance of RM2,000 under the collective agreement since his transfer was by the order of the defendant. The plaintiff was also entitled to freight charges of RM1,000 under the provisions of the collective agreement. (paras 28, 33 & 34)

(6) The plaintiff drew a salary of RM1,033 as an operator and this fact was within the knowledge of the defendant. The plaintiff worked for seven years after the accident and was paid a monthly salary by the defendant. At the time of the accident, the plaintiff was 31 years old. The loss of future earnings was calculated to the amount of RM61,980. (para 37)

(7) The parties failed to show that the findings of fact by the learned SCJ were perverse or ran contrary to the weight of evidence. Thus, this court did not set aside these correct findings of fact. (para 39)

Case(s) referred to:

Che Noh Yacob v. Seng Hin Rubber (M) Sdn Bhd [1981] 1 LNS 135 FC ***(dist)***

Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28A

Employees' Social Security Act 1969, ss. 31, 42

For the appellant - TM Varughese; M/s TM Varughese & Co
For the respondent - Amir; M/s Nurul & Charan

[Appeal from Sessions Court, Teluk Intan; Summons No: 53-271-2010]

Reported by Kumitha Abd Majid

JUDGMENT

Ahmad Nasfy Yasin JC:

Appeal

[1] On 18 January 2012, after full trial the learned Sessions Court Judge ("the learned SCJ") allowed the respondent/plaintiff's claim against the appellant/defendant with costs. Hence the appellant/defendant appealed against the whole decision and the respondent/plaintiff cross-appealed against the issue pertaining to the apportionment of liability, which I shall allude later in this judgment.

[2] On appeal, I dismissed the both appeals with no order as to costs. Dissatisfied with my decision, the appellant/defendant now appealed to the Court of Appeal. For the purpose of this appeal parties will be referred to as they appear in the court below.

Brief Facts

[3] The defendant or the company was the employer of the plaintiff. The plaintiff commenced employment on 25 August 2003 as an operator performing desludging services at various premises within Ipoh branch. He possessed valid driving licence and qualified to drive the defendant's company lorry tanker. He wanted to be a driver in the company but as there was no drivers' job available he was offered and accepted the job of an operator. His duty as an operator includes assisting the driver of the lorry tanker in desludging services.

[4] On 26 October 2005 while the plaintiff was driving the company's lorry tanker WEW 4675 and on duty, met with an accident hitting an oncoming vehicle AES 3680 and landed in the ditch on a left side of the road.

[5] As a result of the accident, the plaintiff suffered injuries ie, fractured right femur and laceration wounds. He made claims with SOCSO and was paid benefits totalling RM29,878 up to the date of the hearing in court on 24 July 2012.

[6] From the date of accident on 26 October 2005 the plaintiff was mostly on medical/SOCSO leave on full pay until he was medically boarded out on 9 March 2012. Upon him being medically boarded out, he was finally paid RM7,972.50.

[7] On 23 November 2010 the plaintiff filed an action against the defendant in Sessions Court Teluk Intan claiming the total blame for cause of the accident on the defendant.

[8] The defendant's defence was in the complete opposite of the plaintiff's contention. Before the hearing commenced, counsel for the defendant raised a preliminary issue that this action is barred because the injury sustained by the plaintiff is an employment injury and an insured person under SOCSO is covered by the Employees' Social Security Act 1969 ("SOCSO Act"). Section 31 of the SOCSO Act says:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any

A compensation or damages under any written law from the time being in force in respect of employment injury sustained as an employee under this Act.

[9] Counsel for the defendant also referred to the case of *Che Noh Yacob v. Seng Hin Rubber (M) Sdn Bhd* [1981] 1 LNS 135; [1982] 1 MLJ 80 on the issue of an insured person suing his employer. Section 31 of the SOCSO Act was referred to and the court ruled that when a person is insured under the Act, ss. 31 and 42 is a complete bar to any claim against the employer under common law.

[10] In reply to the preliminary issue, counsel for the plaintiff had submitted that the proviso to s. 31 of the SOCSO Act is wide enough not only to allow claims from third party but also between the employee or the insured. It was canvassed that the plaintiff's claim is clearly an injury which is outside the scope of his employment. At the time of the accident, the plaintiff was not a driver but an operator. Therefore his claim arises outside the scope of his employment and any SOCSO claim will only be dealt with under his employment contract as an operator. The issue whether the plaintiff is driver or operator ought not to be decided as a preliminary issue but left at the trial.

[11] After hearing the preliminary issue raised by the defendant's counsel and reply by the plaintiff's counsel the learned SCJ concluded in his finding that the new proviso to s. 31 of that SOCSO Act is wide enough to cover not only the third party, but also the plaintiff, an insured person and that there are issues that could only be determined through a full trial. Hence the preliminary issue was dismissed.

Issue For Determination

[12] There are essentially two issues to be determined as follows:

(i) Whether the plaintiff's claim is barred pursuant to s. 31 of SOCSO Act; and

(ii) If the answer is negative, whether the defendant is liable to the plaintiff and if so the extent of damages claimable by the plaintiff.

Finding Of This Court

Issue I

[13] It is pertinent to note that the learned SCJ having reviewed evidence concluded that the plaintiff was not a driver but an operator. The learned SCJ also found that as a matter of fact that on the fateful day he was asked to drive the company vehicle WEW 4675 and met with an accident. Thus the issue before the learned SCJ was whether at the time of the accident the plaintiff was performing his duty under the employment and in determining this the secondary consideration is whether the change of functions from an operator to that of a driver in the defendant company when the driver is off duty or unavailable would deprive the plaintiff of the right to claim damages in view of the provisions of the SOCSO Act.

[14] It is my considered view that the decision by learned SCJ in dismissing the preliminary objection by the defendant is free from error. I am of the opinion and I so hold that the plaintiff's claim herein is for an injury which is outside the scope of his employment where at the time of the accident he was not a driver but an operator.

[15] In my judgment, quite clearly, the plaintiff's claim is for the injuries that he had suffered as a result of complying with the directions given by the defendant company and not within the scope of his contract of employment as it is clear that his job designation and scope is limited to that of an operator and that he is not under an obligation under the terms of employment and also under the collective agreement to be a driver. Thus the plaintiff is strictly not under the contractual and employment duty when he was performing driver's duty and suffered injury at that time.

[16] In this respect and having given due consideration to the case of *Che Noh Yacob* (*supra*) which was relied on by the defendant on the issue of an insured person suing his employer, I am of the considered view that the case could be distinguished on its facts. In that case it is to be recalled that the Federal Court ruled that when a person is insured under the Act, ss. 31 and 42 is a complete bar to any claim against the employer under common

law. It is instructive to note that this decision was made in 1982 before the amendment to the proviso to s. 31 of SOCSO Act. The proviso to s. 31 says:

> Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987 (Act 333).

[17] In short, the amendment says that the prohibition against a claim is not applicable in cases of motor vehicle accident where the employer or his servant is required to be insured against third party risks.

[18] In my view the claim herein falls squarely within the exception stated in the proviso whereby the claim arises from a motor vehicle accident. This means that the proviso to s. 31 is wide enough not only to allow claim from third party but also between the employee and the insured.

[19] In this case the plaintiff's claim is for negligence which comes under the law of negligence which in turn falls within the purview of s. 28A of the Civil Law Act 1956. Hence, the injury suffered by the plaintiff is not within the definition of "employment injury" of the SOCSO Act 1969.

[20] That being the case, the learned SCJ has correctly dismissed the preliminary issue raised by the defendant's counsel.

[21] In any event it is to be recalled that the plaintiff's claim is not only limited to personal injury. He is also claiming for certain contractual payments that he alleged that he is entitled to get but the defendant had refused to pay.

Issue II

[22] The facts of this case are fairly straightforward. The plaintiff was asked to drive the defendant's lorry on daily basis after he was transferred from his former station in Manjung to Teluk Intan. This was because the permanent driver, Mr Joel Subramaniam suffered a stroke and could not drive. Prior to the accident, the plaintiff experienced some difficulties in that the tanker lorry's brake was faulty. The plaintiff then took the tanker lorry to the workshop Win Tat Jaya Automotive and on 6 October 2005 the

workshop commented that the brake was faulty. After the lorry was repaired on the 6th October the plaintiff went back to the workshop to pick up the lorry. He was told to test drive the lorry and when he did, he found out the brake, especially the one on the right are still giving problems and he send it back to the workshop. On the 20 October 2005 he test drove it with the foreman seated beside him but he found the brake problem still persists. Subsequently the foreman told one Encik Puteh, the fleet executive of the defendant company about the problem and suggested to change the brake drums. Encik Puteh told the plaintiff to take back the lorry and drive it for a week and get back to him if the problem still persists. After he took back the lorry he was afraid to drive and he told his supervisor Jaafar Sidek ("SP2") the same but SP2 and one senior officer Encik Rozainal (SD1) told him to drive anyway as there was a lot of work to be done (exh. P3). There was a report that was prepared to show that the tanker lorry's brake was faulty named "tanker performance report for tanker WEW 4675" marked as P2 and needed to be changed. The plaintiff met with an accident when negotiating a bend. He applied the brake but as expected the lorry moved to the right to the path of oncoming vehicle. In the agony of the moment he swerved to avoid the accident and landed in a ditch. The plaintiff fractured his right femur and had laceration wounds.

[23] The defendant denied total negligence as it says it had taken all reasonable steps and got the vehicle repaired twice whenever plaintiff complained. According to SD3 senior manager of the defendant's HR department the plaintiff was negligent and had committed a misconduct when driving the lorry despite the fact that he knew the brake was defective, thus endangering the life of the operator who was with him in the lorry. He further said that the responsibility to maintain the company's vehicle is shared equally between the driver driving the vehicle and the company. This goes to show that the defendant is not entirely to be blamed if the vehicle is faulty as in this case the brake did not function properly.

[24] In this case it is to be recalled that the evidence of the plaintiff showed that he had communicated this faulty brake through his immediate superior who in turn had informed his higher officer. The fact that the defendant knew about the faulty brake was shown through SD3's evidence when he unwittingly

mentioned about the same and its effect when writing the letter of warning to the plaintiff. Further, the evidence of the foreman of the workshop that he had informed one Encik Puteh about the brake problem and suggested that the brake drums needed to be changed was never challenged by the defendant. In short it was not disputed that the brake was defective and it was also not disputed that there were two repairs made to the brake.

[25] Having stated the above, I am of the view that it is probable that the defendant had known about the defective brake and necessity of changing the brake drums but instead the defendant instructed the plaintiff to drive the lorry despite not taking necessary action to fully repair the brake of the lorry. To my mind plaintiff is also partly to be blamed as he knew the risk of driving the lorry with the defective brake. Being an operator and not a driver the plaintiff can refuse to follow the order of his superior to drive.

[26] Thus I am of the considered view that the learned SCJ is correct when he ruled that the defendant and the plaintiff are equally liable. I cannot detect any error when the learned SCJ made this finding at the same time is supported by evidence and is not perverse.

Quantum

General Damages

[27] The plaintiff suffered segmental fracture of the femur with 1.5cm shortening besides scars and laceration. Plaintiff's counsel had suggested a global figure of RM60,000 but the defendant's counsel did not submit any figure as it was his stand that the plaintiff had not particularised the injuries in the statement of claim and hence had not proven their claim. Having referred to the compendium for personal injury, the learned SCJ awarded the sum RM45,000 for the said injury on global basis.

[28] As regard to the pleading, I wish to refer to the case of *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324 whereby the Federal Court stated that it is well established principle that special damages, in contrast to general damages, have to be specifically pleaded and strictly proved. The reason that special damages have to be specifically

pleaded is to comply with its objects, which is to crystallise the issue to enable both parties to prepare for trial. The exact loss must be pleaded where the precise amount of damages had become clear either before the trial or because it has already occurred and had crystallised and the damages can be measured with complete accuracy. The underlying purpose is to put defendant(s) on their guard and to tell them what they have to meet when the case comes to trial.

[29] In this case the plaintiff's pleading in particular para. 8 reads as follows:

> 8. Akibat daripada kemalangan tersebut Plaintif telah mengalami kecederaan dan juga kehilangan serta kerugian. Butir-butir kecederaan Plaintif akan dikemukakan semasa perbicaraan.

[30] From the said paragraph, it is clear that the plaintiff had pleaded that he is claiming special as well as general damages but as regards to the injuries he stated that the particulars of injuries will be adduced at the trial. The defendant to my mind, facing with this sort of averment, is also not caught by surprise because they, as the case progresses to trial, bundles of documents are filed which contained the medical report which clearly alludes to the injury that the plaintiff had suffered as well as other damages - see *Chu Kim Sing & Anor v. Abd Razak Amin* [1999] 4 CLJ 448; [1999] 6 MLJ 433. In any event the defendant is seized with an opportunity to request for particulars. Thus the defendant's counsel's contention that the general damages were not pleaded is unsustainable.

[31] As stated in the orthopedic specialist medical report by Dr Prasad that the plaintiff's femoral bone was fractured in a few places (segmental fracture) and that the plaintiff had permanent disabilities. The fracture caused the plaintiff's right leg to be shortened by 1.5cm and he walk with a limping gait.

[32] Taking all facts into consideration it is my judgment that the global sum awarded by the learned SCJ is fair and reasonable and I see no reason for me to disturb the findings made by the Sessions Court Judge.

Special Damages

Driver Allowance

[33] In the light of the entire evidence, the plaintiff was an operator by designation and was made to drive the company's tanker. The defendant's witnesses said that under the collective agreement, an operator with a valid licence to drive a lorry may drive the company's vehicle and he may claim driver's allowance every time he drives the company's vehicle. In this case the defendant's witnesses admitted that the plaintiff was made to drive daily ever since he was transferred from Manjung to Teluk Intan because the permanent driver had suffered a stroke and would not drive. Thus the plaintiff is entitled to claim driver's allowance under the collective agreement. The plaintiff claimed that he had not been paid for the year 2004 but he failed to produce the application form that he submitted for driver's allowance. Thus this item was not allowed by the learned SCJ which I agree.

Transfer Allowance

[34] The defendant's stand is that the collective agreement does not provide for transfer allowance if it is done at the request of the employee. The plaintiff on the other hand said that he was directed by the defendant to be transferred to Teluk Intan since the company wanted him to take over from the permanent driver who suffered a stroke. Having considered the conflicting evidence of both parties, the learned SCJ found that it would be more probable that the defendant had all the more reasons to transfer an operator from Manjung in order that he could take over the permanent driver's role. Hence the learned SCJ found that the plaintiff is entitled to the transfer allowance of RM2,000 under the collective agreement since his transfer was by the order of the defendant. In similar vein, the plaintiff is also entitled for freight charges of RM1,000 as allowed under the provisions of the collective agreement. I am in full agreement with the learned SCJ on this aspect.

Medical Expenses

[35] The plaintiff claims for the amount not paid for by the defendant after the "Prolonged illness scheme" ended. The learned SCJ allowed this item as it had been proved through the bill produced in court. I agree with the approach of the learned SCJ and found no reason to disturb this finding.

Loss Of Earnings

[36] The defendant had conceded that he had been paid in full during his tenure as an operator and relief driver who was made to drive daily. What the plaintiff is claiming is loss of future earning for not being able to work by reason of his disabilities as a result of the defendant's negligence.

[37] From the evidence adduced the plaintiff had drawn a salary of RM1,033 as an operator. This fact is within the knowledge of the defendant and there is no dispute about it. The plaintiff had worked for seven years after the accident and was paid a monthly salary by the defendant. At the time of the accident the plaintiff is 31 years old. Thus the learned SCJ had allowed the loss of future earnings calculated as follows:

55 - 31 ÷ 2 = 12 years - 7 years = 5 years

RM1,033.00 x 12 x 5 years = RM61,980.

[38] I see no reason to disturb the calculation as it is in order and in keeping with the practices.

[39] To sum up, the appeal and the cross-appeal were directed entirely based on findings of fact by the learned SCJ, which findings the parties had failed to show that they were perverse or run contrary to the weight of evidence. Thus as I have stated earlier, it is not open to this court to set aside these correct findings of fact.

[40] In the result, these appeals stand dismissed with no order as to costs.